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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 EMBOTELLADORA ELECTROPURA  
11 S.A. de C.V.,  
12 Plaintiff,  
13 v.  
14 ACCUTEK PACKAGING EQUIPMENT  
15 COMPANY, INC.; and DOES 1 through  
16 25, inclusive,  
17 Defendants.

Case No.: 3:16-cv-00724-GPC-RNB

**ORDER**

**(1) GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SANCTIONS; and**

**(2) DENYING PLAINTIFF'S  
MOTION FOR SANCTIONS**

**[ECF No. 52]**

18  
19 Before the Court is a motion for determination of discovery dispute filed jointly by  
20 the parties in this case. (ECF No. 52.) The dispute arises from Plaintiff's late production  
21 of a large amount of documents relevant to its claim of consequential damages.  
22 Defendant seeks sanctions as a result of Plaintiff's failure to produce these documents as  
23 required by Federal Rule of Civil Procedure 26.

24 On April 12, 2018, Magistrate Judge Robert N. Block issued a report and  
25 recommendation (the "R&R") suggesting the Court deny the sanctions request in its  
26 entirety. (ECF No. 54.) Both parties have filed objections to the R&R (ECF No. 55  
27 (Defendant); ECF No. 56 (Plaintiff)) and responses to each other's objections (ECF No.  
28 57 (Plaintiff); ECF No. 58 (Defendant)). For the reason set forth below, the Court finds

1 that continuing the trial date and permitting Defendant to engage in limited discovery will  
2 render Plaintiff's Rule 26 violations harmless. The Court also rejects Plaintiff's request  
3 for attorneys' fees resulting from this motion.

#### 4 **I. Legal Standard**

5 28 U.S.C. § 636(b)(1) provides that after a magistrate judge has issued a report and  
6 recommendation and the parties have filed objections, the district court "shall make a de  
7 novo determination of those portions of the report . . . to which objection is made." The  
8 district court "may accept, reject, or modify, in whole or in part, the findings or  
9 recommendation made by the magistrate judge." *Id.* The district court "may also receive  
10 further evidence or recommit the matter to the magistrate judge with instructions." *Id.*  
11 Aspects of the report and recommendation to which there is no objection may be  
12 reviewed with deference. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005);  
13 *Swanson v. Comm'r of Soc. Sec. Admin.*, 274 F. Supp. 2d 932, 935–36 (D. Ariz. 2017).

#### 14 **II. Background**

15 Plaintiff, a Salvadoran corporation, filed this case on March 25, 2016, asserting  
16 claims of fraud, misrepresentation, breach of contract, breach of warranties, and  
17 restitution. (ECF No. 1.) Plaintiff alleges that Defendant sold it a defective water  
18 bottling machine. (*Id.* ¶¶ 28, 30.)

##### 19 **A. Protective Order**

20 In a declaration, Plaintiff's counsel Jacob Segura states that in November 2016 he  
21 and Defendant's counsel Mitchell B. Malachowski "engaged in a series of telephonic and  
22 email discussions and negotiations for the purpose of arriving at a mutually agreeable  
23 proposed Joint Discovery Plan." (ECF No. 52-4 at 2.<sup>1</sup>) During that discussion, according  
24 to Segura, the attorneys both "perceived the need for [the parties] to jointly enter into [a]  
25 'Stipulation for Protective Order' to safeguard the parties' respective privileged and  
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28 <sup>1</sup> Page citations in this ruling refer to the pagination provided by the CM/ECF system.

1 confidential information.” (*Id.*) According to Segura, during these discussions the two  
2 attorneys “agreed that the parties’ voluntary disclosures would not include information  
3 which either side deemed confidential. Rather we mutually agreed that the exchange of  
4 the parties’ respective confidential information would take place by and through formal  
5 discovery, and then only after the terms and conditions of a mutually agreeable Stipulated  
6 Discovery Protective Order had been worked out, and after the Court had signed and  
7 entered such a Discovery Protective Order.” (*Id.* at 3.)

8 In a declaration filed with Defendant’s objection to the R&R,<sup>2</sup> Malachowski  
9 disputes that any such agreement occurred. Malachowski states that the first mention of a  
10 protective order between the parties was in Malachowski’s first draft of the parties’ joint  
11 discovery plan, which he sent to Segura on November 11, 2016, after Segura failed to  
12 respond to a meet-and-confer letter. (ECF No. 55-1 at 2.) At some point in the next two  
13 weeks, Malachowski claims, Segura and Malachowski had a telephone conversation  
14 during which “[t]he portion of the proposed plan [regarding confidential information]  
15 was not the topic of meaningful discussion,” and they “did not discuss, nor agree to, the  
16 exclusion of proprietary material from the initial disclosures. There was no discussion of  
17 [Plaintiff] possessing confidential information.” (*Id.*)

18 The parties filed a proposed joint discovery plan to Magistrate Judge David H.  
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21 <sup>2</sup> “[A] district court has discretion, but is not required, to consider evidence presented for the first time in  
22 a party’s objection to a magistrate judge’s recommendation.” *United States v. Howell*, 231 F.3d 615,  
23 621 (9th Cir. 2000); *see also* 28 U.S.C. § 636(b)(1)(C) (in reviewing the R&R, the district court “may  
24 also receive further evidence”). The Court finds it appropriate to consider the evidence offered by both  
25 parties in their objections to the R&R. Defendant explains that it did not include in the original joint  
26 motion any discussion of conversations between Segura and Malachowski because Defendant’s counsel  
27 was under the impression that Magistrate Judge Bartick’s orders prohibited responsive declarations.  
28 (ECF No. 55 at 2 n.1.) While the Court is not sure why Defendant chose not to include a responsive  
declaration in the original motion itself, the Court finds that the ends of justice require consideration of  
all the evidence before the Court so as to avoid the risk of making a consequential decision based on less  
than all of the available evidence. In fact, the R&R even noted that “it does not have the benefit of a  
declaration from Mr. Malachowski in response to the declaration of Mr. Segura, and that it is  
conceivable Mr. Malachowski would dispute Mr. Segura’s characterization of what the two of them  
agreed to.” (ECF No. 54 at 4 n.1.)

1 Bartick on November 22, 2016. (*Id.* at 3.) That proposed plan included the following  
2 statement, which Malachowski claims was in his original draft: “The Parties, however,  
3 are currently considering a proposed Stipulation for Protective Order regarding the  
4 information produced by Defendants during the Initial Disclosure because anticipated  
5 discovery may contain confidential commercial information potentially subject to trade  
6 secret protection.” (*Id.* at 2–3.) On December 2, 2016, Magistrate Judge Bartick issued a  
7 scheduling order setting the deadline for initial disclosures under Rule 26(a)(1) as  
8 January 4, 2017. (ECF No. 19.) On January 6, 2017—two days after Defendant made its  
9 initial disclosures to Plaintiff—Malachowski sent Segura an email proposing that the  
10 parties submit a stipulated protective order and explaining that Defendant was in  
11 possession of confidential information “that it wished to produce in accordance with its  
12 initial disclosure obligations in this matter.” (ECF No. 55-1 at 3.) Having not received a  
13 response from Segura, Malachowski sent two follow-up emails on January 10 and 13.  
14 (*Id.*) In response to the January 13 email, Segura responded the same day indicated that  
15 Plaintiff was “amenable” to a protective order and asked Malachowski to draft one. (*Id.*  
16 at 29.) The same day, Segura sent Malachowski Plaintiff’s “Initial Disclosures.” (ECF  
17 No. 52-4 at 32–34.) Contained in those disclosures were a batch of documents Bates  
18 Stamped “EE000001-EE000396.” (*Id.* at 33–34.)

19 On January 17, 2017, Malachowski sent Segura a draft stipulated protective order.  
20 (ECF No. 55-1 at 3–4.) Despite follow-up emails, a letter, and a phone call, Segura did  
21 not respond—other than a January 30 email stating that he would get back to  
22 Malachowski “shortly”—until February 16, when Segura sent Malachowski an email  
23 with Plaintiff’s responses to Defendant’s first set of interrogatories and requests for  
24 production. (*Id.* at 4, 48.) In that email, Segura stated “Please let me know when you  
25 have some available time next week to discuss the terms of a mutually agreeable  
26 stipulated protective order.” (*Id.* at 48.) Malachowski responded the following day  
27 indicating that he was available the following Monday. (*Id.* at 4, 50.) Segura again did  
28 not respond, despite another follow-up email, a telephone call, and a letter by

1 Malachowski. (*Id.* at 4–5.) On March 1, after Malachowski called and emailed Segura  
2 once more, Segura responded by email asking Malachowski what time the two should  
3 speak the following day; Malachowski responded twenty-some minutes later suggesting  
4 9:30 a.m. (*Id.* at 5, 59, 62.) Segura did not respond to the email and did not call the next  
5 morning at 9:30 a.m. (*Id.* at 5.) After 9:45 a.m. passed, Malachowski called and emailed  
6 Segura, but to no avail. (*Id.* at 5, 65.) Counsel were apparently able to connect soon  
7 after.

8 On March 10, the parties submitted a joint motion for protective order. (ECF No.  
9 20.) The motion stated the “parties have determined that disclosure and discovery  
10 activity in this action are likely to involve production of confidential . . . information for  
11 which special protection . . . may be warranted. Specifically, the documents to be  
12 protected include Plaintiff’s corporate financial data which is necessary to establish  
13 damages.” (*Id.* at 2.) Magistrate Judge Bartick approved and entered the protective order  
14 on March 28. (ECF No. 21.)

### 15 **B. Early Disclosures and Discovery Responses**

16 In its January 13, 2017 initial disclosure, Plaintiff identified 396 pages of  
17 documents under the heading “Documents and Things.” (ECF No. 52-3 at 8–9.) As  
18 mentioned above, these documents were the Stamped “EE000001-EE000396.” Under  
19 the heading of “Damages,” Plaintiff stated “The amount of [Plaintiff’s] damages is not  
20 presently calculated with certainty and is subject [to] further clarification and  
21 augmentation based upon the results of still ongoing discovery and additional and  
22 ongoing consequential and incidental damages.” (*Id.* at 9.) Plaintiff never updated its  
23 initial disclosures during the discovery period. (*Id.* at 2.)

24 On February 16, 2017—prior to the parties’ submission of a proposed protective  
25 order—Plaintiff responded to Defendant’s first set of interrogatories and requests for  
26 production (“RFPs”). (*Id.* at 12–34.) The responses included a general objection that the  
27 interrogatories and requests “seek disclosure of proprietary and/or confidential business  
28 information of [Plaintiff]. To the extent [they] seek such information, [Plaintiff] will

1 respond only pursuant to a Protective Order under Fed. R. Civ. P. 26(c).” (*Id.* at 13, 27.)  
2 At that time, no protective order had been signed by the Court. Despite these objections,  
3 Plaintiff did offer responses to the interrogatories and requests for production. In  
4 response to Interrogatory 12, which asked “[i]f you contend that you are entitled to  
5 recover consequential damages in this matter, identify all documents supporting such  
6 contention,” Plaintiff responded “See Bates Stamp Nos. EE000001-EE000396.” (*Id.* at  
7 18–19.) In response to RFP 5, which requested “[i]f you contend that you are entitled to  
8 recover consequential damages in this matter, all documents and electronic data  
9 supporting that contention,” Plaintiff responded in relevant part, “See Bates Stamp Nos.  
10 EE000001-EE000396.” (*Id.* at 30.)

11 On April 7, 2017—ten days after Magistrate Judge Bartick approved the protective  
12 order—Defendant produced to Plaintiff, under the terms of the protective order, 252  
13 pages of confidential documents. (ECF No. 55-1 at 6.)

#### 14 **C. Defendant’s Rule 30(b)(6) Deposition Notice**

15 On June 21, 2017, Defendant served Plaintiff with a notice of corporate deposition  
16 under Fed. R. Civ. P. 30(b)(6), setting a date of July 17, 2017. Five of the “matters for  
17 testimony” listed in the notice were relevant to Plaintiff’s damages. (ECF No. 52-3 at  
18 114–15.) The notice also stated that each “deponent will be required to produce at the  
19 deposition the documents and electronically stored information identified in Schedule B  
20 attached to this notice.” (*Id.* at 110.) The matters discussed in Schedule B included  
21 documents and electronic data relating to Plaintiff’s lost profits, loss of goodwill,  
22 consequential damages, and attempts to mitigate damages. (*Id.* at 121.) Upon receiving  
23 this notice, Plaintiff designated twelve of its employees to compile documents responsive  
24 to Defendant’s corporate deposition notice; in all, these employees spent 696 hours over  
25 six weeks working to complete this compilation. (*See* ECF No. 52-5.) The Court will  
26 refer to this compilation of documents as the “Consequential Damages Documents.”

27 The Rule 30(b)(6) depositions were delayed on several occasions. On July 19,  
28 2017, the parties filed a joint motion to extend the discovery deadline to August 25, 2017.

1 (ECF No. 34.) Magistrate Judge Porter granted the motion on July 20. (ECF No. 35.)  
2 On July 26, Malachowski called Segura and indicated that, in light of a pending motion  
3 for partial summary judgment, Defendant was taking the depositions off calendar, but it  
4 might re-notice them prior to the August 25 discovery deadline. (ECF No. 52-4 at 8–9.)  
5 The Court issued its ruling on the motion for partial summary judgment on August 2,  
6 2017. (ECF No. 36.) In the coming weeks, Segura and Malachowski worked to resolve  
7 scheduling issues, but the August 25 discovery deadline elapsed without the depositions  
8 being taken. (ECF No. 52-4 at 9–13.) On August 25 Malachowski suggested to Segura  
9 that October 23 could be possible date for the deposition, but Malachowski failed to  
10 follow up. (*Id.* at 13.)

11 On September 15, 2017, Judge Porter extended the discovery deadline to  
12 November 13, 2017. (ECF No. 37.) Nonetheless, Defendant’s counsel again took no  
13 action to initiate the depositions, and November 13 passed without the depositions being  
14 re-noticed. (ECF No. 52-4 at 14.) During a November 16 settlement conference, both  
15 parties asked for another extension of the discovery deadline. (*Id.* at 16.) Magistrate  
16 Judge Porter granted the extension for specific depositions of both parties’ witnesses, as  
17 well as both parties’ Rule 30(b)(6) deponents, to December 15, 2017. Magistrate Judge  
18 Porter warned, however, that “[t]he Court will not entertain any further motions to extend  
19 the discovery cutoff.” (ECF No. 40 at 2.) On December 5, 2017, Malachowski served  
20 Segura with an amended corporate deposition notice that omitted all of the 28 categories  
21 of document requests that were included in the original notice. (ECF No. 52-4 at 16–17.)  
22 Ultimately, none of the depositions went forward. (*Id.* at 17.)

23 On February 10, 2018, Segura filed an ex parte motion to modify the scheduling  
24 order in which he sought a re-opening of the discovery period. (ECF No. 41.) Magistrate  
25 Judge Stormes denied the motion on February 13. (ECF No. 45.) On February 15—the  
26 day before the deadline for the parties to submit a proposed pretrial order—Segura  
27 produced to Malachowski the Consequential Damages Documents and listed these  
28 documents on Plaintiff’s proposed trial exhibit list. (ECF No. 52-3 at 3; ECF No. 52-4 at

1 19–20.) The documents are 8.2 gigabytes in size in compressed form, and contain 2  
2 video files and 93 PDFs totaling 27,424 pages. (ECF No. 52-3 at 3.) They “appear to  
3 largely be [Plaintiff’s] accounting and financial records from April 2013 to October 2016,  
4 and marked confidential pursuant to the protective order.” (ECF No. 52-1 at 5.)

5 Segura claims that he had always intended to produce the Consequential Damages  
6 Documents “through the discovery process,” but because the depositions never went  
7 forward, he never had the chance to provide them. (ECF No. 52-4 at 18.) According to  
8 his declaration, this was because he wanted to schedule all depositions during the same  
9 week in San Diego. (*Id.* at 18–19.)

#### 10 **D. Current Motion and the R&R**

11 On March 12, the parties filed the instant joint motion for determination of dispute.  
12 (ECF No. 52.) In it, Defendant seeks sanctions against Plaintiff primarily as a result of  
13 Plaintiff’s delayed production of the Consequential Damages Documents, and Plaintiff—  
14 contending that the sanctions request is frivolous and that Defendant failed to meet and  
15 confer in good faith over this request—seeks attorneys’ fees as a result of this motion.  
16 (ECF No. 52.) According to Defendant, sanctions are warranted because Plaintiff had an  
17 obligation to disclose the Consequential Damages Documents (1) as part of its initial  
18 disclosures under Rule 26(a)(1)(a), and/or (2) in response to Defendant’s first set of  
19 discovery requests. (ECF No. 52-1 at 7–9.)

20 On April 12, 2018, Magistrate Judge Block issued an R&R recommending that the  
21 Court deny the motion for sanctions in its entirety. (ECF No. 54.) The R&R first rejects  
22 Plaintiff’s assertion that none of the sanctions sought by Defendant are available because  
23 there has been no court order compelling Plaintiff’s compliance. (*Id.* at 6–8.) The R&R  
24 explains that this rule, which was imposed by the Ninth Circuit in *Uniguard Security*  
25 *Insurance Company v. Lakewood Engineering & Manufacturing Corporation*, 982 F.2d  
26 363 (9th Cir. 1992), was abrogated in 1993 by an amendment to Rule 37. (ECF No. 54 at  
27 7.) Plaintiff does not object to this conclusion. (*See* ECF No. 56.)

28 Next, the R&R rejects Defendant’s argument that Plaintiff violated its initial

1 disclosure requirements under Rule 26(a)(1) by failing to produce the Consequential  
2 Damages Documents until February 2018. The R&R reasons that, according to Segura’s  
3 declaration, Malachowski “had agreed well in advance of the initial disclosures that  
4 [Plaintiff] did not have to provide any of its damages-related privileged and confidential  
5 corporate financial information as part of its initial disclosures, but rather need only  
6 provide such information in response to formal discovery requests and pursuant to the  
7 terms of a mutually agreed, Court-approved and entered Discovery Protective Order.”  
8 (ECF No. 54 at 8.) The R&R states that Segura’s characterization of the attorneys’  
9 agreement to produce confidential information only through “formal discovery” is  
10 consistent with the representations in the parties’ March 10, 2017 joint motion for  
11 protective order in which they state “disclosure and discovery activity in this action are  
12 likely to involve production of confidential, proprietary, or private information for which  
13 special protection . . . may be warranted,” that “the documents to be protected include  
14 Plaintiff’s corporate financial data which is necessary to establish damages,” and “that  
15 the parties were requesting the entry of the proposed protective order ‘[i]n order to permit  
16 this discovery to go forward.’” (*Id.* (quoting ECF No. 20 at 2).) The R&R also notes that  
17 Rule 26(a)(1)(A)(iii)’s initial disclosure requirements are “qualified by the phrase,  
18 ‘unless privileged or protected from disclosure.’” (*Id.*) In Magistrate Judge Block’s  
19 view, Plaintiff’s “corporate financial records constituted confidential information that  
20 [Plaintiff] could reasonably assert were protected from disclosure in the absence of a  
21 protective order.”

22 The R&R next rejects Defendant’s argument that Plaintiff violated its duty to  
23 produce the Consequential Damages Documents in response to Defendant’s first-set  
24 Interrogatory 12 and RFP 5, which asked for evidence of consequential damages. The  
25 R&R explains that, at the time Defendant sent Plaintiff its first set of interrogatories and  
26 RFPs, Segura and Malachowski had not yet submitted their motion for protective order.  
27 The R&R points out that two days after the protective order was entered, Defendant  
28 submitted an ex parte motion for determination of discovery dispute seeking an order

1 compelling Plaintiff to respond to several aspects of Defendant’s first-set Interrogatories  
2 and RFPs, none of which included Interrogatory 12 or RFP 5. (*Id.* (citing ECF No. 22).)  
3 The R&R explains that, despite Defendant being on notice of Plaintiff’s confidentiality  
4 objection to the first-set interrogatories and RFPs, Defendant neither challenged that  
5 objection nor “move[d] to compel a further response to Interrogatory [12] or [RFP] 5.”  
6 (*Id.* at 9–10.) The R&R also reasons that Defendant’s June 21, 2017 Rule 30(b)(6)  
7 deposition notice—which included a production of documents relevant to Plaintiff’s  
8 computation of damages—rendered moot any insufficient response by Plaintiff to  
9 Defendant’s first-set Interrogatory 12 or RFP 5. (*Id.* at 10.)

10       The R&R concludes by noting that according to Segura’s declaration Plaintiff was  
11 prepared to produce the Consequential Damages Documents in response to Defendant’s  
12 Rule 30(b)(6) deposition notice, and if Defendant had “proceeded to take those  
13 depositions, instead of repeatedly delaying and ultimately electing not to go forward with  
14 them,” Defendant would have received the documents prior to February 2018. (*Id.*)  
15 Indeed, the R&R suggests that Defendant’s “conduct in ultimately electing to forego  
16 taking the Rule 30(b)(6) depositions and then turning around and taking the position that  
17 case dispositive sanctions should be imposed on [Plaintiff] for not producing the  
18 documents [Plaintiff] had been prepared to produce at the time of the depositions smacks  
19 of gamesmanship.” (*Id.* at 11.) The R&R recommends that “no sanctions under Rule  
20 37(c)(1), let alone the case dispositive sanctions sought” are appropriate. (*Id.* at 9, 10.)

### 21       **III. Discussion**

22       In light of the above facts offered by Defendant, the Court concludes that Plaintiff  
23 violated its obligation to supplement its initial disclosure and responses to Defendant’s  
24 discovery requests by failing to produce the Consequential Damages Documents until  
25 February 2018. The Court nonetheless concludes that a continuance of the trial to permit  
26 Defendant to review the Consequential Damages Documents and depose one of  
27 Plaintiff’s witnesses—Clara Rodriguez de Granados—will render most of Plaintiff’s  
28 violations harmless. The Court will not, however, permit Plaintiff to offer evidence in

1 support of its claim for consequential damages through testimony other than that offered  
2 by Ms. Rodriguez de Granados.

3 **A. Whether The Agreement Claimed By Segura Occurred**

4 Defendant first objects to the R&R on the ground that Segura's declaration in  
5 opposition to Defendant's sanctions request contains a "material misrepresentation"  
6 about Segura's and Malachowski's understanding of how confidential information would  
7 be produced in this case. (ECF No. 55 at 2–5.) Defendant asserts that, contrary to  
8 Segura's assertion, there was no agreement that confidential information would be  
9 excluded from initial disclosures and produced only through formal discovery. (ECF No.  
10 55-1 at 2.) According to Malachowski, while he and Segura spoke on the telephone  
11 about the parties' proposed discovery plan, the issue of the need for a protective order  
12 "was not a topic of meaningful discussion." (*Id.*) If such an agreement was made,  
13 Defendant contends, it would have been included in the proposed discovery plan or  
14 protective order. In support of its side of this story, Defendant points to the series of  
15 correspondence between Malachowski and Segura discussed above, which suggest that  
16 (1) Malachowski drafted the proposed discovery plan eventually submitted to the Court,  
17 and (2) Malachowski first raised with Segura the issue of a protective order after the  
18 discovery plan was submitted because Defendant was "in possession of additional  
19 [proprietary and confidential] documents it wishes to produce as part of its initial  
20 disclosures." (*Id.* at 23.) These communications, according to Defendant, "indicate[]"  
21 that there was *no* prior discussion of the need for a protective order." (ECF No. 55 at 4.)  
22 Defendant also points out that immediately after the protective order was entered,  
23 Defendant supplemented its initial disclosures by providing Plaintiff with confidential  
24 materials. (*Id.* at 4–5.)

25 Plaintiff contends that the correspondence and filings cited by Defendant do not  
26 establish that no such agreement was reached between Segura and Malachowski. (ECF  
27 No. 57 at 8–9.) Plaintiff focuses on Malachowski's statement that no "meaningful"  
28 discussion about the need for a protective order occurred between him and Segura,

1 asserting that this choice of wording implies there indeed was discussion of that issue.  
2 Plaintiff also argues that the wording of the parties' joint discovery plan—which  
3 indicates a recognized need to protect confidential information, specifically Plaintiff's  
4 evidence of damages—suggests that such an agreement did occur between the attorneys.

5 Based on the evidence before it, the Court finds it most likely that Segura and  
6 Malachowski did not reach an agreement that the parties in this case would produce  
7 proprietary and confidential information only through the course of formal discovery.  
8 The only evidence suggesting that this specific agreement occurred is Segura's  
9 declaration asserting so. All other evidence before the Court suggests that no such  
10 agreement was reached. Contrary to Plaintiff's assertion, the fact that Malachowski  
11 states that he and Segura had no "meaningful" discussion about the protective order  
12 supports Defendant's position. That is to say, an agreement to relieve the parties of their  
13 initial disclosure requirements would require at least some "meaningful" discussion of  
14 the issue. Moreover, the fact that neither the discovery plan nor the protective order says  
15 anything about this alleged agreement is strong evidence against its existence. The fact  
16 that Defendant supplemented its own initial disclosures to Plaintiff with confidential  
17 materials just ten days after the protective order was issued also strongly suggests that  
18 Malachowski did not understand that the parties' proprietary and confidential information  
19 need only be disclosed in response to formal discovery requests.

## 20 **B. Whether Plaintiff Violated Rule 26's Requirements**

21 Next, Defendant objects to the R&R by arguing that Plaintiff did violate its  
22 discovery obligations under Rule 26. Defendant asserts that Plaintiff did so in two ways:  
23 (1) failing to update its initial disclosures, and (2) failing to update its responses to  
24 Defendant's first-set Interrogatory 12 and RFP 5. The Court agrees with Defendant on  
25 both grounds.

### 26 **i. Initial Disclosures**

27 Rule 26(a)(1) sets forth the parties' automatic obligations to make initial disclosure  
28 of certain documents "within 14 days of the parties' Rule 26(f) conference unless a

1 different time is set by stipulation or court order, or unless a party objects during the  
2 conference that initial disclosures are not appropriate in this action and states the  
3 objection in the proposed discovery plan.” Fed. R. Civ. P. 26(a)(1)(C). As discussed  
4 above, the parties indicated in their proposed discovery plan that there was confidential  
5 information in possession of both parties and as a result they intended to seek a protective  
6 order. In light of the Court’s conclusion that the parties did *not* agree to exempt such  
7 confidential information from their initial disclosures, the Court concludes that the parties  
8 were obligated to complete their initial disclosures within 14 days after the Court  
9 approved the parties’ protective order, which would have been April 11, 2017.

10 Rule 26(a)(1)(A)(ii) required Plaintiff to produce in its initial disclosures a copy or  
11 description of all documents in its possession that it “may use to support its claims or  
12 defenses, unless the use would be solely for impeachment.” Rule 26(a)(1)(A)(iii)  
13 required Plaintiff to provide Defendant with “a computation of each category of  
14 damages” and “make available for inspection and copying . . . the documents or other  
15 evidentiary material, unless privileged or protected from disclosure, on which each  
16 computation is based, including materials bearing on the nature and extent of injuries  
17 suffered.” Each party making a disclosure under Rule 26(a) must also supplement or  
18 correct such disclosures “in a timely manner if the party learns that in some material  
19 respect the disclosure or response is incomplete or incorrect,” assuming the information  
20 had not already been disclosed through other means. Fed. R. Civ. P. 26(e)(1)(A).

21 Defendant argues that Plaintiff violated Rule 26(a)(1)(A)(ii) by failing to make a  
22 timely disclosure of the Consequential Damages Documents, which was evidence  
23 Plaintiff “may use to support its claims.”<sup>3</sup> (See ECF No. 52-1 at 8.) In *R&R Sails, Inc. v.*  
24 \_\_\_\_\_

25 <sup>3</sup> The R&R seems to treat Defendant’s argument as asserting a violation of subparagraph (a)(1)(A)(iii).  
26 (See ECF No. 54 at 8–9 (invoking Rule 26(a)(1)(A)(iii)’s language exempting from inspection  
27 documents that are “privileged or protected from disclosure”).) In its memorandum, however,  
28 Defendant explicitly relies only on subparagraph (ii). (See ECF No. 52-1 at 8 (the Consequential  
Damages Documents “are necessary to prove [Plaintiff’s] case-in-chief, or in terms of Rule  
26(a)(1)(A)(ii) these are documents [Plaintiff] ‘may use to support its claims,’” meaning Plaintiff “was

1 *Insurance Company of Pennsylvania*, 673 F.3d 1240 (9th Cir. 2012), the Ninth Circuit  
2 seems to have adopted Defendant’s view of subparagraph (ii)’s scope. There, an insured  
3 pursued, among others claims, a bad-faith denial claim against an insurer. The insured  
4 sought attorneys’ fees and punitive damages as a result of its claim. In its initial  
5 disclosures, the insured disclosed that it sought \$350,000 in fees and stated “this amount  
6 is estimated at this time and will be amended at the time of trial.” *Id.* at 1243. The  
7 insured did not state in the disclosure “that it planned to use invoices to support its claim  
8 for” fees, and it did not produce any such invoices to the insurer. *Id.* Two months after  
9 the discovery period closed the insurer asked the insured to produce all documents  
10 relating to the insured’s claimed damages. *Id.* The insured did not turn over the invoices.  
11 *Id.* In a pretrial memorandum, the insured stated that it planned to offer at trial invoices  
12 reflecting its claimed fees, and revised its estimate of damages to \$450,000. *Id.* The  
13 insured did not produce these invoices until after the final pretrial conference. *Id.* The  
14 district court ultimately precluded the insured from using the invoices as evidence  
15 because it had violated “Rules 26(a) and (e).” *Id.* at 1245.

16 The Ninth Circuit held that the district court did not abuse its discretion in  
17 concluding that the insured had violated its initial disclosure requirements.<sup>4</sup> *Id.* at 1246–  
18 47. The court reasoned that subparagraph (ii) “required [the insured] to produce either a  
19 copy or a description of the documents on which it based its damages calculation.”<sup>5</sup> *Id.* at  
20

21 fully obligated to identify or produce all of these documents in January 2017 as part of its initial  
22 disclosures”).)

23 <sup>4</sup> The panel reversed, however, on the ground that because the district court’s exclusion amounted to a  
24 dismissal of the insured’s cause of action, the district court was obligated to determine whether the  
discovery violation was willful, and also consider the availability of lesser sanctions. *Id.* at 1247–48.

25 <sup>5</sup> The court qualified its discussion with an initial disclaimer that “[c]ontrary to the district court’s  
26 apparent suggestion,” the insured “was not required to affirmatively produce its attorney’s fee invoices  
27 during the discovery period without a request from” the insurer. *Id.* at 1246. The only way to square  
28 this disclaimer with the panel’s following statement that subparagraph (ii) required the insured to make  
an initial disclosure of “a copy or a description of the documents on which it based its damages  
calculation” is to read the disclaimer as asserting that outright production of the documents themselves,  
as opposed to copies or a description of the documents, was not necessary to satisfy the insured’s initial  
disclosure obligations.

1 1246. The insured did not satisfy that obligation, the panel explained, because the  
2 insured merely “provided the approximate amount of [its] fee request without describing  
3 the documents on which it based the request,” and it never supplemented that initial  
4 disclosure “after it became evidence that the initial disclosures were incomplete.” *Id.* at  
5 1246–47. The panel then explained that “[i]n addition, though Rule 26(a)(1)(A)(iii) did  
6 not require affirmative production of the invoices, it required” the insured to make them  
7 available for inspection, which the insured did not do when the insurer requested them.  
8 *Id.* at 1247 (emphasis added).

9 The *R&R Sails* description of subparagraph (ii)’s requirements makes clear that  
10 Plaintiff did not meet its disclosure obligations under that provision. While outright  
11 production of the original Consequential Damages Documents was not necessary,  
12 Plaintiff was required to “produce either a copy or a description of the documents on  
13 which it based its damages calculation,” which it was obligated to do. *Id.* at 1246.  
14 Because Plaintiff never supplemented its original disclosure after the protective order was  
15 issued, Plaintiff failed to comply with its duty to supplement its initial disclosures under  
16 Rule 26(e)(1)(A).

## 17 **ii. Interrogatory 12 and RFP 5**

18 Even if Plaintiff did not violate its initial disclosure obligations, it is clear that  
19 Plaintiff failed to respond properly to Defendant’s discovery requests. In addition to  
20 requiring parties to supplement their initial disclosures, Rule 26(e)(1)(A) provides that a  
21 “party who has . . . responded to an interrogatory [or] request for production . . . must  
22 supplement or correct its disclosure or response . . . in a timely manner if the party learns  
23 that in some material respect the disclosure or response is incomplete or incorrect.”<sup>6</sup>  
24

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25  
26 <sup>6</sup> As noted above, this provision is qualified by the assertion that supplementation need not be made “if  
27 the additional or corrective information has not otherwise been made known to the other parties during  
28 the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1)(A). There is no suggestion here that  
Plaintiff otherwise made Defendant aware of the information contained in the Consequential Damages  
Documents.

1 Defendant argues that Plaintiff failed to supplement its response to Interrogatory  
2 12 and RFP 5 in a timely manner after the Court issued the protective order. The R&R  
3 recommends that the Court reject this argument. It points out that two days after the  
4 protective order was issued, Defendant filed a motion to compel Plaintiff to further  
5 respond to several aspects of Defendant's first-set discovery requests. Those specific  
6 aspects of the first-set discovery requests did *not* include Interrogatory 12 or RFP 5.  
7 (ECF No. 22.) The R&R reasons that

8 [e]ven though [Defendant] clearly was on notice from the statement in the  
9 Joint Motion for a Protective Order and from [Plaintiff's] general objection  
10 to both sets of discovery that [Plaintiff] had not produced or identified  
11 responsive documents that supported its consequential damages claims,  
12 [Defendant] did not move to compel a further response to Interrogatory No.  
12 or Request for Production No. 5. Nor did [Defendant] challenge the  
above-[referenced] general objection.

13 (ECF No. 54 at 9–10.) The R&R also reasons that the protective order had not been  
14 issued when Plaintiff responded to Defendant's first-set discovery requests, and "by  
15 renewing its discovery requests after the entry of the Protective Order for the same  
16 discovery relating to" Interrogatory 12 and RFP 5 in its Rule 30(b)(6) deposition notice,  
17 "the insufficiency of Plaintiff's earlier responses to those discovery requests, which  
18 [Defendant] had never challenged, became moot." (*Id.* at 10.)

19 The Court respectfully disagrees with both lines of the R&R's reasoning. First, the  
20 fact that Defendant did not move to compel a full response to Interrogatory 12 and RFP 5  
21 after the protective order was issued did not alter Plaintiff's obligation under Rule 26 to  
22 supplement its incomplete responses to Interrogatory 12 and RFP 5. In its response to  
23 Defendant's first set of discovery requests, Plaintiff objected on the basis that "they seek  
24 disclosure of proprietary and/or confidential business information," and "[t]o the extent  
25 the[y] do seek such information, [Plaintiff] will respond *only pursuant to a Protective*  
26 *Order* under Fed. R. Civ. P. 26(c)." (ECF No. 52-3 at 13, 27 (emphasis added).) Once  
27 the Court issued the protective order on March 28, 2017, Rule 26(e)(1) required Plaintiff  
28 to supplement its responses to Interrogatory 12 (seeking identification of "all documents

1 supporting” Plaintiff’s claim of consequential damages) and RFP 5 (seeking production  
2 of “all documents and electronic data supporting” Plaintiff’s claim of consequential  
3 damages) in a timely manner. Not only did Plaintiff not do so; it did not even begin to  
4 compile the Consequential Damages Documents until late June 2017. (*See* ECF No. 52-5  
5 at 4.)

6 As to the R&R’s second point, the Court is unable to find any case law supporting  
7 the proposition that a deposition notice renders moot an earlier discovery request  
8 covering the same subject matter. Without such authority, the Court must assume that  
9 Rule 26(e)(1)(A) means what it says: a party that has responded to an interrogatory or  
10 request for production incompletely must supplement that response “in a timely manner if  
11 the party learns that in some material respect the disclosure or response is incomplete.”

12 It should also be noted that even if the deposition notice did supersede Defendant’s  
13 earlier discovery request, there is no explanation for Plaintiff’s failure to produce the  
14 Consequential Damages Documents by the final discovery deadline of December 15,  
15 2017, which Magistrate Judge Porter made explicitly clear would not be extended. (ECF  
16 No. 40 (“The Court will not entertain any further motions to extend the discovery  
17 cutoff.”).) And even if Segura for some reason thought Magistrate Judge Porter’s  
18 warning was not serious, there is no explanation for his waiting two months *after* the  
19 expiration of that deadline to file another extension request.

20 In sum, the Court concludes that even if Plaintiff did not violate its initial  
21 disclosure requirements, it violated its duty to supplement its incomplete responses to  
22 Interrogatory 12 and RFP 5.

### 23 **C. Sanctions**

24 The violations found above trigger the possibility of sanctions under Rule 37. That  
25 rule provides “[i]f a party fails to provide information . . . as required by Rule 26(a) or  
26 (e), the party is not allowed to use that information . . . to supply evidence . . . at a trial,  
27 unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).  
28 While Rule 37(c)’s sanctions are “self-executing,” the Ninth Circuit gives district courts

1 “particularly wide latitude” in determining whether sanctions are appropriate. *Ollier v.*  
2 *Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir. 2014) (quoting *Yeti by*  
3 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)).

4 Plaintiff offers no substantial justification for its failure to comply with its  
5 discovery obligations. First, Plaintiff claims that Segura and Malachowski reached the  
6 agreement discussed at length above, that is, that they would not produce confidential  
7 information except in response to formal discovery requests. Even if that agreement did  
8 occur, that does not explain Plaintiff’s failure to supplement its responses to Interrogatory  
9 12 or RFP 5, which were formal discovery requests. The best explanation for Plaintiff’s  
10 failure to supplement its responses to Interrogatory 12 or RFP 5 is Segura’s claim that he  
11 intended to produce the Consequential Damages Documents at the Rule 30(b)(6)  
12 deposition noticed by Defendant. But Plaintiff fails to explain why (1) it did not begin  
13 compiling the Consequential Damages Documents until June 2017, or (2) it waited two  
14 months after the final discovery deadline expired to produce them. According to  
15 Plaintiff, it took six weeks to compile the Consequential Damages Documents. (*See* ECF  
16 No. 52-5 at 8.) Assuming this compilation effort began within ten days of Plaintiff  
17 receiving Defendant’s Rule 30(b)(6) deposition notice, Plaintiff would have had  
18 completed compiling the Consequential Damages Documents by mid-August 2017,  
19 approximately four months before the final discovery deadline and six months before  
20 Plaintiff actually produced the documents. The Court cannot find any justification for  
21 these delays.

22 The Court concludes, however, that a continuance of the trial will render Plaintiff’s  
23 Rule 26 violations harmless. *See Bailey v. Shell Western E&P, Inc.*, 609 F.3d 710, 729  
24 (5th Cir. 2010) (considering, when determining whether Rule 37(c)’s exclusionary  
25 sanction is appropriate, “the possibility of curing such prejudice by granting a  
26 continuance”). At the June 28, 2018 motion in limine hearing, Defendant’s counsel  
27 spoke of the effort that will be required to review and respond to the Consequential  
28 Damages Documents. Based on that discussion, the Court believes that reopening

1 discovery for the limited purpose of permitting Defendant to depose Plaintiff's  
2 designated expert on the issue of consequential damages would cure the prejudice that  
3 would result from otherwise moving forward with the current trial date and allowing  
4 Plaintiff to offer as evidence the Consequential Damages Documents.

5 **The Court therefore orders that the trial in this case shall be rescheduled to**  
6 **begin on October 29, 2018 at 9:00 a.m. Discovery is hereby reopened for the limited**  
7 **purpose of permitting Defendant to depose Clara Rodriguez de Granados, who has**  
8 **been designated by Plaintiff as an expert who will provide testimony at trial**  
9 **regarding the financial consequences suffered by Plaintiff as a result of Defendant's**  
10 **conduct.**

11 During the most recent hearing, Plaintiff's counsel named Ms. Rodriguez de  
12 Granados as the only expert that would speak on the issue of consequential damages at  
13 trial. Because the continuance of the trial announced in this order permits Defendant to  
14 depose only Ms. Rodriguez de Granados, **the Court will exclude at trial any testimony**  
15 **in support of Plaintiff's consequential damages claim offered by any witness other**  
16 **than Ms. Rodriguez de Granados.** Any such testimony would prejudice Defendant  
17 because Defendant will not have had the opportunity to depose that witness on the issue  
18 of consequential damages.

19 Beyond Rule 37(c), the Court possesses inherent authority to enter sanctions  
20 against attorneys who engage in misconduct. *See Knickerbocker v. Corinthian Colls.*,  
21 298 F.R.D. 670, 677 (W.D. Wash. 2014). The Court finds that use of such inherent  
22 power to sanction Plaintiff under these circumstances would not be appropriate. While it  
23 is clear that Plaintiff violated its discovery duties in this case, Defendant's counsel's  
24 missteps have also contributed to the current situation. Malachowski's failure to provide  
25 a responsive declaration in the joint motion for determination of this dispute led to a  
26 significant waste of judicial resources. Magistrate Judge Block even noted that he was  
27 issuing the R&R on an incomplete record because he did not have the benefit of a  
28 statement from Malachowski about the agreement Segura claims he and Malachowski

1 reached. Malachowski's failure to include in the original motion a declaration offering  
2 his side of the story prevented the Court from efficiently utilizing the report and  
3 recommendation procedures. In light of that failure, the Court finds sanctions against  
4 Plaintiff to be unwarranted.

5 In sum, the Court finds that the most appropriate way to resolve the current dispute  
6 between the parties is to continue the trial and reopen discovery for the limited purpose of  
7 permitting Defendant to depose Clara Rodriguez de Granados.

#### 8 **D. Plaintiff's Objections to the R&R**

9 In the parties' joint motion, Plaintiff argued that Defendant failed to meet and  
10 confer in good faith with Plaintiff before proceeding with its request for sanctions.<sup>7</sup> (ECF  
11 No. 52-2 at 10–11.) Plaintiff pointed to the fact that approximately ten minutes after  
12 Segura and Malachowski telephonically met and conferred about the discovery dispute at  
13 issue here, Malachowski sent Segura the contents of its motion for sanctions. (*See* ECF  
14 No. 52-4 at 80.) According to Plaintiff, the fact that Malachowski had prepared the  
15 motion prior to the parties' meet-and-confer conversation means that Malachowski did  
16 not meet and confer in good faith over this discovery dispute. (ECF No. 56 at 8–9.) The  
17 Court disagrees. The only conclusion the Court can draw from the fact that Malachowski  
18 prepared his motion prior to the attorneys' conference is that Malachowski was prepared  
19 to file the motion immediately should the meet-and-confer conference not resolve the  
20 dispute. According to an email provided by Plaintiff, during the attorneys' meet-and-  
21 confer conference Segura made an offer to present his "client witnesses" the following  
22 week "for deposition and examination concerning the" Consequential Damages  
23 Documents, which Malachowski turned down. (ECF No. 52-4 at 77–78.) The Court  
24 does not view Malachowski's declination of that offer to constitute bad faith. At that  
25 point, discovery had been closed for three months.

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27  
28 <sup>7</sup> The R&R does not address this issue.

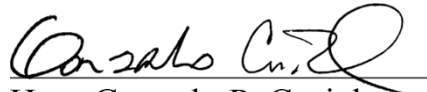
1 In sum, the Court does not find that Defendant failed to meet and confer in good  
2 faith with Plaintiff prior to filing the instant motion for sanctions. In light of that  
3 conclusion, the Court rejects Plaintiff's request for attorneys' fees as a result of the  
4 instant motion.

5 **IV. Conclusion**

6 For the reasons set forth above, the Court concludes that Plaintiff failed to make a  
7 timely production of the Consequential Damages Documents under Rule 26. The Court  
8 concludes, however, that a continuance of the trial and reopening discovery for a limited  
9 purpose renders Plaintiff's violations harmless. Defendant may depose Plaintiff's expert  
10 Clara Rodriguez de Granados. Because of the limited nature of the reopened discovery  
11 period, however, the Court will not permit Plaintiff to offer evidence of consequential  
12 damages in the form of testimony by anyone other than Ms. Rodriguez de Granados.  
13 Last, the Court does not find that Defendant's counsel failed to meet and confer in good  
14 faith over this dispute.

15 **IT IS SO ORDERED.**

16 Dated: July 5, 2018

17   
18 Hon. Gonzalo P. Curiel  
19 United States District Judge  
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